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No. 91-10

IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., *et al.*,
Petitioners,

vs.

SHIRLEY MCQUILLAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

JAMES D. VAIL*
JONATHAN L. STARK
SCHNEIDER, SMELTZ, RANNEY
& LAFOND
1525 National City Bank Building
Cleveland, Ohio 44114
(216) 696-4200
Attorneys for Petitioners

*Counsel of Record

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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QUESTION PRESENTED

Whether a manufacturer's distributor expressly absolved of violating section 1 of the Sherman Act can be found liable for attempting to monopolize without any evidence of market power or specific intent solely by virtue of a unique Ninth Circuit rule?

LIST OF PARTIES

The Petitioners are Spectrum Sports, Inc. and Kenneth B. Leighton.

Respondents are Shirley McQuillan and Larry McQuillan who sometimes did business as Sorboturf Enterprises.

The following individual and companies were co-defendants in the case below. They petitioned this Court for a writ of certiorari, were assigned Case No. 91-32, and are affected by the outcome of this case:

BTR, Inc., which, at all relevant times, owned, directly or indirectly, Hamilton-Kent Manufacturing Co., Inc. and Sorbothane, Inc.

Hamilton-Kent Manufacturing Company, Inc. was purchased by a BTR, Inc. subsidiary in 1978.

Sorbothane, Inc., an indirect, wholly-owned subsidiary of BTR, Inc., was formed in 1982 to take over Hamilton-Kent Manufacturing Co.'s Sorbothane business.

Kenneth M. Leighton is Kenneth B. Leighton's father. He served as President of Hamilton-Kent Manufacturing Co. and then Sorbothane, Inc. at all relevant times.

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OPINIONS BELOW

The memorandum decision of the court of appeals is not reported and is found at page A1 of the Appendix to the Petition for Writ of Certiorari. ("Pet. App."). The judgment of the district court is not reported and is found at Pet. App. A29.

JURISDICTION

The memorandum decision of the court of appeals was entered July 3, 1990. Pet. App. A1. A petition for rehearing with a suggestion for rehearing *en banc* was denied on April 1, 1991. Pet. App. A32. The petition for a writ of certiorari was filed on June 28, 1991, and was granted on March 30, 1992. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This suit arises from the termination of Respondents' alleged right to distribute products made from a shock absorbent material known as Sorbothane. At trial, a jury exonerated Petitioners on a price fixing claim brought under section 1 of the Sherman Act (J. A. 408), but awarded damages to Respondents upon finding Petitioners violated section 2 of the Sherman Act.[1] J. A. 410. The trial court trebled that damage award and also awarded attorneys' fees and costs. Pet. App. A31. On appeal, Petitioners argued, among other things, that sufficient evidence did not exist for the jury to find Petitioners liable for "attempting to monopolize" in violation of the Sherman Act because

(a) there was no evidence of Petitioners' share of any relevant market,

(b) there was no evidence of Petitioners' specific intent to monopolize,

(c) the jury exonerated Petitioners from the claim of a *per se* violation of section 1, and

(d) no evidence of clearly predatory conduct by Petitioners was produced.

The Court of Appeals for the Ninth Circuit, nonetheless, affirmed the trial court's judgment based solely on the attempt to monopolize claim. It expressly declined to review the other issues presented. Pet. App. A28. The court of appeals subsequently denied Petitioners' petition for rehearing with a suggestion for rehearing *en banc*.

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[1] The jury also exonerated Petitioners from claims for violation of the California antitrust statute (J. A. 411), fraud (J. A. 398), and violation of 18 U.S.C. §1962(a) (RICO) (J. A. 412), and found them liable for interference with prospective business advantage (J. A. 406), unfair competition (J. A. 405), and violation of 18 U.S.C. §§1962(b), (c) and (d) (RICO) (J. A. 413-15).

Sorbothane is a visco-elastic polymer[2] primarily incorporated into products as a shock-absorbing material. Sorbothane entered the commercial market in the United States when BTR, Inc. ("BTR") obtained the right to manufacture and sell Sorbothane. BTR is a holding company which at all relevant times owned, directly or indirectly, Hamilton-Kent Manufacturing Company, Inc. ("H-K") and Sorbothane, Inc. The involvement of these companies and their employees with the Petitioners and Respondents is described below.

1. H-K's Good-Faith Selection of Regional Distributors.

On August 20, 1980, H-K obtained a sub-license to manufacture Sorbothane products for three years. J. A. 298. H-K first tried using Sorbothane in horseshoe pads. In fact, Respondent Shirley McQuillan ("McQuillan") was involved in the early development of Sorbothane for equestrian uses because her extensive work with horses exposed her to the potential benefits of shock-absorbing pads on horses. R. 2442. H-K subsequently explored using Sorbothane as a shock-absorbing insole in athletic shoes.

In late May or early June, 1981, after an unsuccessful attempt to market Sorbothane through a national distributor, Kenneth M. Leighton ("Leighton Senior"), H-K's President, asked Laurene Heinsohn ("Heinsohn"), a recent college graduate and then marketing manager at H-K, to prepare a marketing plan for Sorbothane insoles. J. A. 193, 225. After completing her analysis, Heinsohn presented a plan that called for the creation of regional distributors. She initially identified McQuillan, McQuillan's father Myron McCone,

[2] A visco-elastic polymer is a solid which absorbs energy like a liquid, *i.e.*, it dissipates energy. R. 1670.

Arnold Lund, and Martin Vogel as distributors. R. 1069-70. Shortly thereafter, she added Kenneth B. Leighton ("Leighton Junior") as the fifth distributor.[3] R. 794.

Heinsohn selected these individuals because she believed them to be the only ones available, interested, and ready to begin selling Sorbothane products. J. A. 194. The regional distributors were assigned exclusive territories and did not compete with one another. Plaintiffs' Exhibit 4. The regional distributors did compete with marketers of other products containing different shock absorbing materials.[4]

Heinsohn eventually realized her selection of the distributors was done without adequate research. She admitted she failed to do a proper investigation (J. A. 195), made no credit checks, and was ignorant of the distributors' marketing skills and business backgrounds. R. 793. However, Heinsohn's undisputed testimony was that her decision was made in good faith—not part of any illicit plan—and the selections resulted from her own inexperience. J. A. 195.

2. H-K Considers National Distributors.

In early January, 1982, H-K appointed IEM Orthopedics ("IEM") as the national medical distributor of Sorbothane products. R. 3760. In the last week of January, 1982, a meeting was held at which John Burne

[3] Leighton Junior and Michael Silvestro subsequently incorporated Ohio Cushions, Inc. which was renamed Spectrum Sports, Inc. ("Spectrum").

[4] Heinsohn, a witness hostile to Petitioners, testified that Sorbothane competed nationally with Spenco and with other products regionally. R. 973. Leighton Junior corroborated the existence of interbrand competition (R. 2908), as did Richard Olsen, an expert witness who testified for the defense. R. 3344-45.

("Burne"), the owner of IEM, Heinsohn, Leighton Senior, and Leighton Junior were present. Leighton Junior attended the meeting at the request of Heinsohn.

The meeting addressed the distribution of Sorbothane products, particularly in the medical field. J. A. 346-47, R. 2866. Burne proposed that H-K's regional distribution system be replaced by national distributors for each of the Sorbothane product groups; specifically, IEM would be the national distributor for medical products, Spectrum the national distributor for athletic products, Myron McCone, the national distributor for industrial products, and McQuillan the national distributor for equestrian products.[5] J. A. 179-80. According to Burne's proposal, the other distributors would maintain their territories, but would operate under Spectrum's supervision. J. A. 181-82. Heinsohn endorsed Burne's proposal because once IEM had been selected as a national distributor for medical products, national distributors for other Sorbothane products made good business sense to her. R. 1083. Heinsohn also was enthusiastic about selecting Spectrum as the national distributor of athletic products reasoning that Leighton Junior had the most business sense of all the regional distributors and, therefore, Spectrum would purchase more Sorbothane from H-K. R. 1084.

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[5] Leighton Junior had openly expressed to Heinsohn his goal of becoming a national distributor of Sorbothane athletic products. Plaintiffs argued at trial and on appeal that Leighton Junior intended to achieve that goal by some nefarious plan. However, the only evidence on this issue—offered by plaintiffs' own witness, Heinsohn,—failed to support this contention and, instead, confirmed that Leighton told Heinsohn he planned to achieve his goal by out-performing the other distributors. R. 798, 1074. Leighton Junior's goal was no different than McQuillan's goal to be the national distributor for equestrian products.

3. The Chicago Meeting.

Heinsohn presented this proposal to structure national distributors to H-K's regional distributors at a sales meeting in Chicago on February 10, 1982. J. A. 149. She tried many ways to persuade them to accept this plan, one of which was to exaggerate the amount of Sorbothane purchased by Spectrum so as to convince the other distributors Spectrum was the superior distributor. J. A. 183. The uncontested evidence established Heinsohn took this approach without Leighton Junior's or Spectrum's knowledge or prompting. J. A. 184. Leighton Junior did not learn of Heinsohn's ploy until a few days after the meeting, by which time the other distributors had already rejected her plan. J. A. 226-27. Thereafter, the regional distribution system remained in place. J. A. 184.

4. Spectrum's Arrangement with Lund and Vogel.

In early March, 1982, following negotiations initiated by Lund, Spectrum purchased Lund's distributorship in the northwest region. J. A. 227. In the same month, H-K terminated Vogel because of poor performance. R. 1518. By the end of March, 1982, Spectrum had arranged for both Vogel and Lund to act as sales representatives for Spectrum. J. A. 228. Under these arrangements, Spectrum paid each of them commissions on sales made in their former territories. Vogel and Lund's commission rate was 30%—much more than the 10% Spectrum ordinarily paid its sales representatives. J. A. 229. This premium was designed to compensate Lund and Vogel for their work in developing their former territories. J. A. 228-30. At the end of March, 1982, there were three regional distributors—Respondents, McQuillan's father, and Spectrum.

In April, 1982, Leighton Senior told McQuillan he would consider a proposal from her to become the national distributor for equestrian products. R. 1281. At this time, Respondents were working to produce a marketable horseshoe pad. R. 883. Leighton Senior suggested to McQuillan that she sell her athletic distributorship so she could concentrate on equestrian products, her area of expertise. R. 885, 1281.

In May, 1982, McQuillan traveled to H-K's headquarters and proposed to H-K that she become the national distributor of equestrian products. Leighton Junior was neither aware of, nor present at, that meeting. R. 888. Leighton Senior foresaw great potential in the equestrian market, but did not believe McQuillan had the resources or capacity to serve both as a national distributor of equestrian products and as a regional distributor of athletic products. R. 1281. Consequently, Leighton Senior suggested to McQuillan that she speak with Spectrum concerning the sale of her athletic distributorship. R. 1281.

5. Spectrum's Negotiations with McQuillan.

McQuillan did, in fact, approach Spectrum about selling her distributorship. R. 890. Spectrum offered to pay McQuillan a percentage of gross proceeds for her distributorship, using the same formula it used to buy Lund's distributorship. J. A. 230. McQuillan preferred a lump sum purchase and proposed to sell her business to Spectrum for $400,000. Spectrum rejected that proposal. J. A. 231-32. Later, after reviewing McQuillan's financial statements, Spectrum offered McQuillan $48,000. J. A. 232. She rejected that offer. During these exasperating negotiations, Leighton Junior made unflattering remarks concerning McQuillan's ability to operate a business. J. A. 158-59.

By August, 1982, negotiations with Spectrum for the sale of Respondents' distributorship had ended. J. A. 232. Thereafter, Respondents had very little contact with Leighton Junior and Spectrum. J. A. 234.

Sorbothane, Inc.[6] terminated McQuillan's distributorship in August 1983 when Leighton Senior discovered that, despite McQuillan's denials, she had formed a new business, Equistep, to distribute a Goodyear product that competed directly with Sorbothane, Inc. J. A. 165-71. Spectrum and Leighton Junior were not consulted about, had no prior knowledge of, and did not participate in the decision to terminate Respondents' distributorship. J. A. 236.

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[6] In 1982, BTR formed Sorbo, Inc., an indirect, wholly-owned subsidiary, to take over H-K's Sorbothane business. Leighton Senior became the President of Sorbo, Inc., which later changed its name to Sorbothane, Inc.

SUMMARY OF ARGUMENT

A successful attempt to monopolize claim under section 2 of the Sherman Act requires the plaintiff to demonstrate anticompetitive, or predatory, conduct, specific intent to monopolize, and a dangerous probability of success. *Swift & Co. v. United States,* 196 U.S. 375 (1905). The Court of Appeals for the Ninth Circuit, however, dispenses with two of the three elements of this Court's standard and imposes liability on a defendant upon a showing of merely unfair, or predatory, conduct. *Lessig v. Tidewater Oil Co.,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964).

The *Lessig* rule's current formulation permits the element of dangerous probability of success to be inferred from evidence of specific intent to monopolize which may, in turn, be inferred from evidence of anticompetitive, or predatory, conduct. *Janich Bros. v. American Distilling Co.,* 570 F.2d 848 (9th Cir. 1977), *cert. denied,* 439 U.S. 829 (1978). Such a rule obviates the need for antitrust plaintiffs to define the relevant market in which defendants operate and disregards the issue of potential harm to that market.

Not only does the *Lessig* rule dispense with the dangerous probability requirement and proof of the affected relevant market, but it dispenses with the specific intent to monopolize requirement. Under this rule, unfair conduct, standing alone, constitutes a violation of the antitrust laws.

In this particular case, adherence to the *Lessig* rule allowed the jury to find a violation of section 2 based solely on Petitioners' "unfair" conduct of making unkind comments to Respondents. In short, adherence to the *Lessig* rule allowed what was, at most, an insult to be transformed into an antitrust violation because a full inquiry into Petitioners' specific intent to monopolize and a dangerous probability of their success in monopolizing a relevant market was not required.

Such a relaxed analysis ignores almost a century of antitrust law which distinguishes between concerted activity and unilateral activity. Application of the *Lessig* rule punishes conduct by single firms without inquiring into the effect of the conduct in the relevant market. Thus, the *Lessig* rule permitted Respondents to recover treble damages and attorney fees for conduct which could not harm competition or consumers.

ARGUMENT

I. THE COURT SHOULD STRIKE DOWN THE *LESSIG* RULE BECAUSE INFERRING A DANGEROUS PROBABILITY OF SUCCESS AND SPECIFIC INTENT FROM CONDUCT IMPROPERLY PUNISHES A BUSINESS FOR CONDUCT WHICH DOES NOT ACTUALLY OR POTENTIALLY HARM COMPETITION.

The rule announced in *Lessig v. Tidewater Oil Company*, 827 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) improperly punishes a business by imposing treble damages in cases where competition is not jeopardized.

This Court has long required the plaintiff in an attempt to monopolize case to prove: (1) predatory, or anticompetitive, conduct; (2) specific intent to monopolize; and (3) a dangerous probability of success. *Lorain Journal Co. v. United States,* 342 U.S. 143, 154 (1951); *United States v. Griffith,* 334 U.S. 100, 105-106 (1948); *Swift & Co. v. United States,* 196 U.S. 375 (1905). Justice Holmes explained the foundation for the Court's requirement of all three elements:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring that result to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

Swift & Co., 196 U.S. at 396 (citation omitted).

The Court emphasized the indispensibility of the "dangerous probability of success" element to an attempt to monopolize claim in *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965). In *Walker Process*, the defendant, through a counterclaim, asserted plaintiff's fraudulent acquisition and maintenance of a patent constituted an attempt to monopolize in violation of section 2 of the Sherman Act. The court rejected that claim, holding that the "dangerous probability of success" element requires an analysis of market power. The Court stated:

> To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition.

Id. at 177.

In this case, the court of appeals ignored this Court's rule and affirmed the trial court's judgment, relying solely upon a current version of *Lessig*,[7] a rule peculiar

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[7] In *Lessig*, the plaintiff, Paul Lessig, was a Tidewater Oil Co. ("Tidewater") dealer. Tidewater was accused of attempting to fix prices and imposing tying arrangements upon its dealers. The trial court did not give the jury an instruction on attempt to monopolize because insufficient evidence of a dangerous probability of a successful monopolization was presented. On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that a dangerous probability of success is not an element of an attempt to monopolize claim. The court of appeals concluded that if Lessig could demonstrate Tidewater's specific intent to fix prices and to exclude its dealers from access to other suppliers, and that Tidewater took some step in that direction, then Tidewater was liable for an attempt to monopolize under section 2 of the Sherman Act.

to the Ninth Circuit, which provides that dangerous probability of success may be inferred from evidence of specific intent to monopolize which may, in turn, be inferred from evidence of anticompetitive or predatory conduct.[8] *See, e.g., Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). In affirming the trial court judgment, the court of appeals held:

> We are satisfied that if evidence of *unfair* or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's market power.

Pet. App. A19 (emphasis added).

The *Lessig* rule permits a jury to award antitrust damages without determining the relevant market or the defendant's market power. Worse, it even permits a jury to find a section 2 violation notwithstanding its determination that the defendant lacks significant market power.

The *Lessig* court simply discarded the need for market definition, holding that it is possible for a defendant to attempt to monpolize "'any part' of commerce" even if that "part" does not correspond to a relevant market. *Lessig*, 377 F.2d at 474-75. As a result, a manufacturer with a 1% market share may be found liable for attempting to monopolize by doing nothing more than replacing a distributor of its products.

[8] The trial court, over Petitioners' objection (R. 3917), instructed the jury that

> If the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing [sic] power.

R. 4350.

The flaws of the *Lessig* rule are equally apparent in its application to the present facts. The jury was permitted to find an antitrust violation based only on the fact that one Sorbothane distributor replaced another. The *Lessig* rule permitted the jury to reach this result even though it may have concluded Spectrum lacked market power over the relevant market defined by Defendants' expert as "shock absorbing technology in [the] footwear market[ ]." R. 3344.

The error of the trial court in refusing to instruct the jury regarding the dangerous probability element of an attempt offense was made complete by its failure to require evidence demonstrating Spectrum's specific intent to achieve a monopoly; for it is the specific intent element which is the foundation for the dangerous probability inference.

Lessig requires only that a plaintiff prove anticompetitive, or predatory, conduct. Such a broad-based rule ignores this Court's instruction to lower courts that specific intent to monopolize not be inferred from ambiguous conduct. In *Aspen Skiing Company v. Aspen Highlands Skiing Corporation,* 472 U.S. 585 (1985), this Court held that monopolization could not be proved if the defendant's conduct is justified by any legitimate business purpose. This Court approved the trial court's jury instruction:

> In other words, if there were legitimate business reasons for the refusal, then the defendant even if he is found to possess monopoly power in a relevant market, has not violated the law.

Id. at 597.

In an attempt case, intent is an even more critical element than in monopolization. In attempt cases, the Court requires proof of the defendant's specific intent to monopolize. *E.g., Lorain Journal Co. v. United States,* 342 U.S. 143 (1951). Yet, under *Lessig,* intent—specific or general—need not be proved at all; it becomes a fiction for which other conduct becomes its proxy. A Ninth Circuit jury is not required to determine whether or not potentially ambiguous conduct has a legitimate business purpose.

This case illustrates the harm that results from limiting the analysis in an attempt case to a review of conduct only. In this case, no evidence existed that Petitioners specifically intended to monopolize any market. The jury determined Petitioners did not violate section 1 of the Sherman Act which, under *Lessig* formulations, can form the specific intent basis of the *Lessig* double inference. The only relevant evidence addressing the intent element was Leighton Junior's comment that he sought to earn a national distributorship by outperforming the other regional distributors. Petitioners had virtually no contact with Respondents during the year preceding the termination of Respondents' distributorship. Petitioners did not seek, know of, or participate in Respondents' termination. In this case, Spectrum's perfectly proper intention to become the national Sorbothane distributor for athletic products was, by virtue of the *Lessig* rule, transformed into an illegal intent to monopolize.

Without an independent analysis of the three elements of predatory or anticompetitive conduct, specific intent to monopolize, and a dangerous probability of success, conduct which, at worst, may amount to a business tort, may be deemed an antitrust violation. No other circuit court has adopted the *Lessig* rule; no other circuit permits the imposition of treble damages in cases where competition is not jeopardized.[9]

[9] *See, e.g.*, 1st Cir.: *CVD, Inc. v. Raytheon Corp.*, 769 F.2d 842, 851 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); 2d Cir.: *International Distribution Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790-791 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987); 3d Cir.:

(Footnote continued on following page.)

In *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2nd Cir.), *cert. denied*, 482 U.S. 915 (1987), the court rejected plaintiff's request that it adopt the *Lessig* rule and held:

> *Eliminating the dangerous probability element from attempted monopolization would have the effect of extending the coverage of section 2 of the Sherman Act to similar behavior already covered by state and federal law.* The Federal Trade Commission Act Section 5, 15 U.S.C. §45 (1982), regulatory statutes and state business tort law all reach anticompetitive behavior by firms that lack market power . . . There is no unmet need calling for judicial expansion of section 2 to reach similar behavior. *See*, 3 Areeda and Turner, Section 833(d) at 341.
>
> Furthermore, any significant reduction in the antitrust plaintiff's burden of proving that the defendant has a dangerous probability of monopolizing the market might discourage the healthy competition that section 2 is intended to nurture. . . .

Id. at 791 (emphasis added).

Judge Bork explained the need for the "dangerous probability element" in *Neumann v. Reinforced Earth Company*, 786 F.2d 424, 428 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986):

(Footnote continued from preceding page.)
Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1079 (3d Cir. 1978); 4th Cir.: *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974); 5th Cir.: *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); 6th Cir.: *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); 7th Cir.: *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); 8th Cir.: *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); 10th Cir.: *Bright v. Moss Ambulance Serv.*, 824 F.2d 819, 824 (10th Cir. 1987); 11th Cir.: *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579-81 (11th Cir. 1985); D.C. Cir.: *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 428-29 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986); Fed. Cir.: *FMC Corp. v. Manitowoc Co.*, 654 F. Supp. 915, 934 (N.D. Ill.), *aff'd*, 835 F.2d 1411 (Fed. Cir. 1987).

> The required showing of "dangerous probability," however may provide a court with some assurance, otherwise lacking, that the bad faith litigation constitutes an anticompetitive act and is not merely legal harassment for personal motives. In the latter case the appropriate action would be one in tort for abuse of process or malicious prosecution, not one invoking the full panoply of the antitrust laws, including recovery of triple damages.

As one legal commentator recognized, the *Lessig* rule's inference upon an inference converts the attempt to monopolize portion of section 2 into a glorified business tort statute.

> As monopoly power itself is measured in terms of a relevant market, so must dangerous probability also be measured. Unless you know where a defendant is heading, you cannot find out how close he is to the destination. Thus, the concept of dangerous probability is only meaningful in the context of relevant market.
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> * * *
>
> Under the *Lessig* analysis, any business tort may become an attempt to monopolize case. . . . In other words, the *Lessig* approach reeks of over kill.

Don T. Hibner, Jr., *Attempts to Monopolize: A Concept in Search of Analysis,* 34 ABA Antitrust L.J. 165, 171 (1967).

Congress did not authorize or intend treble damage awards for garden-variety business tort claims which affect only the parties to any particular lawsuit.[10] Yet the Ninth Circuit's *Lessig* rule fails to distinguish between business-tort cases and true antitrust violations. As a result, defendants who may be liable for business tort claims get caught in the treble damage net even though their conduct poses no risk to competition.

[10] Congress authorized the award of treble damages for antitrust violations because it wanted to enlist the public "as allies of the government in enforcing the antitrust laws." 51 Cong. Rec. 9073 (1914). The antitrust laws are designed to benefit society as a whole, not individuals.

II. THE COURT SHOULD STRIKE DOWN THE *LESSIG* RULE BECAUSE ITS ELIMINATION OF THE DANGEROUS PROBABILITY ELEMENT OF AN ATTEMPT TO MONOPOLIZE CLAIM ENCOURAGES PLAINTIFFS TO INITIATE ANTITRUST ACTIONS WHERE COMPETITION IS NOT JEOPARDIZED.

The *Lessig* rule's elimination of the "dangerous probability" element not only reduces a plaintiff's burden in attempt cases, but ignores the distinction between harm to competition and harm to competitors. The antitrust laws are not designed to protect competitors, but rather to protect competition. *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328 (1990); *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984). Without having to prove a dangerous probability of harm to competition in an attempt case, a plaintiff governed by the *Lessig* rule need only show harm to a competitor to be entitled to treble damages and attorneys fees.

As Judge (now Justice) Kennedy held, in affirming the summary judgment on a section 2 claim arising from a distributor substitution:

> That one distributor will be hurt when another succeeds in taking its line will be axiomatic in some markets, as it was here, but the intent to cause that result is not itself prohibited by the antitrust laws. The intent proscribed by the antitrust laws lies in the purpose to harm competition in the relevant market, not to harm a particular competitor.

A. H. Cox v. Star Mach. Co., 653 F.2d 1302, 1307 (9th Cir. 1981).

The Second Circuit came to the same conclusion in *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2nd Cir.) (*en banc*), *cert. denied,* 439 U.S. 946 (1978), where it held that the replacement of one distributor by another was not enough to constitute a *per se* violation of section 1 of the Sherman Act.

> It has always been the prerogative of a manufacturer to decide with whom it will deal. See *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919). Any alleged inducements by Sears to Whirlpool to allow the contract with Oreck to expire may have amounted to tortious interference; but, without some further showing that from this course of conduct there was an anticompetitive effect in the vacuum cleaner industry as a whole, it is inconsistent with the sanctity of contractual arrangements to allow the antitrust laws to inject a provision into the agreement which would require Whirlpool to renew Oreck's distributorship for as long as it is able to compete successfully with Sears. In this case, therefore, something more than an agreement between Whirlpool and Sears to eliminate Oreck must be shown. The agreement becomes violative of Section 1 of the Sherman Act only if it is *anticompetitive in purpose or effect*—in sum, it must be tested by the rule of reason.

Id. at 133 (emphasis in original).

Just as substitution of distributors does not *per se* violate section 1, such a substitution does not violate section 2 unless there is potential harm to competition and the intent to inflict such harm.

Handler and Steuer reviewed the report of The National Commission for the Review of Antitrust Laws and Procedures, specifically analyzing the chapter devoted to attempted monopolization, and concluded competition is rarely harmed by conduct forming the basis of attempt claims:

> The Commission, of course, focused its attention less upon those defendants whose market share created an actual "risk" of monopoly than upon those defendants that exhibited conduct so predatory and vicious that—regardless of market share—their activities should be prohibited. Most of the conduct challenged in attempted monopolization cases, however, is neither predatory nor vicious;
>
> * * *
>
> Judge Morgan in the Fifth Circuit has warned:
>
> > Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.

Milton Handler & Richard M. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 141-143 (1985) (footnotes omitted).

Any inquiry into harm to competition must consider the effect on consumers of the allegedly illegal conduct. As this Court stated in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985):

> The question whether [defendant's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [its competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unncessarily restrictive way.

Id. at 605 (footnote omitted).

Petitioners were not likely to monopolize any market, or for that matter, harm competition in any way. Whether or not Spectrum ever became the national distributor of Sorbothane athletic insoles rather than one of three regional distributors would have no effect whatsoever on competition. Before Respondents' distributorship was terminated, their customers—retailers—had only one source of supply for Sorbothane athletic insoles—Respondents. Respondents were exclusive distributors in the southwestern United States. Petitioners were exclusive distributors in other regions of the United States. After Petitioners replaced Respondents as distributors in the southwest, retailers in the southwest were in the same position; they had one—only one—source of supply for Sorbothane products. Respondents' termination had no effect on competition, yet, under the *Lessig* rule, the jury was not required to even consider the effect on competition or consumers.

III. THE COURT SHOULD STRIKE DOWN THE *LESSIG* RULE BECAUSE IT FAILS TO RECOGNIZE THE DIFFERENT TREATMENT OF UNILATERAL CONDUCT AND CONCERTED ACTION INHERENT IN THE ANTITRUST LAWS.

The Court should reject the *Lessig* analysis because it ignores the distinction between unilateral conduct and concerted action inherent in sections 1 and 2 of the Sherman Act. Proof of the likelihood of actual monopolization is not required in certain section 1 cases because of the great concern associated with concerted activity. Section 2 cases, however, which address single-firm activity, require a more cautious approach before assessing damages. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984); *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 761 (1984).

In *Copperweld*, this Court stated:

> The conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging

> unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepeneur.

Copperweld Corp., 467 U.S. at 767-68 (footnote omitted).

The *Copperweld* Court went on to distinguish section 1 and section 2 claims.

> Concerted activity subject to §1 is judged more sternly than unilateral activity under §2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. . . .
>
> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.

Id. at 768-69.

The *Lessig* rule generally, and particularly as applied in this case, permits juries to treat section 2 cases as if they were section 1 cases—inherently fraught with anticompetitive risk—even though no conspiracy or concerted activity exists.

Justice White, in his dissent from a denial of a petition for certiorari, explained the need for different levels of scrutiny, and why the *Lessig* rule ignores that distinction:

> Sections 1 and 2 of the Sherman Act are directed to different sorts of threats to competition in our economy. Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).
>
> Because the *Lessig* doctrine allows a violation of §2 to be found on the basis of a per se violation of §1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles.

Mobil Oil Corp. v. Blanton, 471 U.S. 1007 (White, *J.*, dissenting), *reh'g denied,* 471 U.S. 1120 (1985).

Legal commentators also believe the *Lessig* rule fails to distinguish between unilateral conduct and concerted action and thus improperly punishes a business which does not harm competition. Professor Kintner observes:

> *Lessig* and the less radical departures from the dangerous probability requirement discussed above would profoundly change the attempt to monopolize offense if those departures were eventually adopted by more courts. The plaintiff's burden of proof would be substantially eased because definition and evaluation of the relevant product and geographic markets would no longer be required. The attempt offense would be significantly expanded to encompass at least some unilateral anticompetitive

> conduct by actors lacking substantial market power. These approaches effectively abandon the traditional views of the attempt offense, which links attempts with monopolization.

Earl W. Kinter, *Federal Antitrust Laws,* §13.4 at 430 (1980).

Professors Areeda and Turner join in the criticism of *Lessig* pointing out that even where proof exists of a *per se* violation of section 1, attempted monopolization cannot be established without identifying a market that may be monopolized. Phillip Areeda & Donald F. Turner, *Antitrust Law,* Section 832(1)(a) (1991 Supp.).

A failure to strike down the *Lessig* rule endorses the subsistence of inefficient businesses in the marketplace, and encourages the use of the antitrust laws to punish efficient businesses. Spectrum is simply a capable business entity. Its abilities, when combined with Respondents' deceit, resulted in Spectrum being the surviving distributor. These events do not rise to the level of a section 2 claim.

CONCLUSION

For the reasons herein, Petitioners Spectrum Sports, Inc. and Kenneth B. Leighton respectfully request this Court to reverse the decision of the court of appeals.

Respectfully submitted,

JAMES D. VAIL*
JONATHAN L. STARK
SCHNEIDER, SMELTZ, RANNEY
& LAFOND
1525 National City Bank Building
Cleveland, Ohio 44114
(216) 696-4200
Attorneys for Petitioners

* *Counsel of Record*